

AMENDED IN SENATE MAY 1, 2007

SENATE BILL

No. 56

Introduced by Senator Runner

January 10, 2007

An act to add and repeal Chapter 6.5 (commencing with Section 6800) of Division 2 of the Public Contract Code, relating to public contracts.

LEGISLATIVE COUNSEL'S DIGEST

SB 56, as amended, Runner. Highway construction contracts: Design-Build Demonstration Program: transportation entities.

Existing law sets forth requirements for the solicitation and evaluation of bids and the awarding of contracts by public entities for the erection, construction, alteration, repair, or improvement of any public structure, building, road, or other public improvement. Existing law also authorizes specified state agencies, cities, and counties to implement alternative procedures for the awarding of contracts on a design-build basis. Existing law, until January 1, 2011, authorizes transit operators to enter into a design-build contract, as defined, according to specified procedures.

This bill would declare the intent of the Legislature to authorize a demonstration program that would allow a careful examination of the benefits and challenges of using a design-build method of procurement for transportation projects.

This bill would, until January 1, 2016, authorize certain state and local transportation entities to use a design-build process for contracting on transportation projects, as specified. This bill would authorize transportation projects, to be selected by the California Transportation Commission, as specified.

This bill would require a transportation entity to implement a labor compliance program for design-build projects. The bill would also require these transportation entities to report to the Legislature and the commission, regarding implementation of the design-build process.

This bill would establish a procedure for submitting bids that includes a requirement that design builders provide a statement of qualifications submitted to the transportation entity that is verified under oath. Because a verification under oath is made under penalty of perjury, the bill would, by requiring a verification, create a new crime and thereby impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Existing constitutional provisions require that a statute that limits the right of access to the meetings of public bodies or the writings of public officials and agencies be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.

This bill would make legislative findings to that effect.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: yes.

The people of the State of California do enact as follows:

1 SECTION 1. Chapter 6.5 (commencing with Section 6800) is
2 added to Division 2 of the Public Contract Code, to read:

3
4 CHAPTER 6.5. THE DESIGN-BUILD DEMONSTRATION PROGRAM

5
6 6800. The Legislature hereby finds and declares all of the
7 following:

8 The design-build method of procurement authorized under this
9 chapter should be evaluated for the purposes of exploring whether
10 the potential exists for reduced project costs, expedited project
11 completion, or design features that are not achievable through the
12 traditional design-bid-build method. A demonstration program
13 will allow for a careful examination of the benefits and challenges
14 of design-build contracting on a limited number of projects. This

chapter shall not be deemed to provide a preference for the design-build method over other procurement methodologies.

6801. For purposes of this chapter, the following definitions apply:

(a) “Best value” means a value determined by objective criteria, including, but not limited to, price, features, functions, life-cycle costs, and other criteria deemed appropriate by the transportation entity.

(b) “Commission” means the California Transportation Commission.

(c) “Design-build” means a procurement process in which both the design and construction of a project are procured from a single entity.

(d) “Design-build entity” means a partnership, corporation, or other legal entity that is able to provide appropriately licensed contracting, architectural, and engineering services as needed pursuant to a design-build contract.

(e) “Department” means the Department of Transportation as established under Part 5 (commencing with Section 14000) of Division 3 of the Government Code.

(f) “Local transportation entity” means a transportation authority designated pursuant to Division 19 (commencing with Section 180000) of the Public Utilities Code, any consolidated agency created pursuant to Chapter 3 (commencing with Section 132350) of Division 12.7 of the Public Utilities Code, the Santa Clara Valley Transportation Authority established under Part 12 (commencing with Section 100000) of the Public Utilities Code, and any other local or regional transportation entity that is designated by statute as a regional transportation agency.

(g) “Transportation entity” means the department and a local transportation entity.

6802. (a) Subject to the limitations of this chapter, a local transportation entity, if authorized by the commission, may utilize the design-build method of procurement for highway, bridge, tunnel, or public transit projects within the jurisdiction of the entity.

(b) Subject to the limitations of this chapter, the department, if authorized by the commission, may utilize the design-build method of procurement for highway, bridge, or tunnel projects.

1 6803. (a) Only ~~_____~~ 10 design-build projects shall be
2 authorized under this chapter. The projects selected shall vary in
3 size, type, and geographical location.

4 (b) The commission shall determine whether a transportation
5 entity may award a design-build contract based on lowest
6 responsible bid or best value. The commission shall balance the
7 number of transportation entities that may use the low-bid and
8 best-value selection methods in order to ensure there is a number
9 of design-build contracts awarded that reflect the cost and benefit
10 of using each method.

11 (c) To be eligible for consideration as ~~one~~ of the ~~_____~~ 10
12 design-build projects, the proposed project shall be subject to the
13 existing process under the state transportation improvement
14 program (Chapter 2 (commencing with Section 14520) of Part 5.3
15 of Division 3 of the Government Code), the traffic congestion
16 relief program (Chapter 4.5 (commencing with Section 14556) of
17 Part 5.3 of Division 3 of the Government Code), or the state
18 highway operations and protection program established pursuant
19 to Section 14526.5 of the Government Code.

20 (d) The commission shall establish a peer review committee to
21 conduct an evaluation of the ~~_____~~ 10 projects selected to utilize
22 the design-build method of procurement.

23 (e) The commission shall establish a standard organizational
24 conflict-of-interest policy, consistent with applicable law, regarding
25 the ability of a person or entity that performs services for the
26 transportation entity relating to the solicitation of a design-build
27 project to submit a proposal as a design-builder or to join a
28 design-build team. This conflict-of-interest policy shall apply to
29 each transportation entity entering into design-build contracts
30 authorized under this chapter.

31 6804. A transportation entity authorized to use the design-build
32 method of procurement shall implement a labor compliance
33 program, as described in Section 1771.5 of the Labor Code, or it
34 shall contract with a third party to implement, on the transportation
35 entity's behalf, a labor compliance program subject to that statute.
36 This requirement does not apply to a project where the
37 transportation entity or design-build entity has entered into any
38 collective bargaining agreement or agreements that bind all of the
39 contractors performing work on the projects.

1 6805. The procurement process for the design-build projects
2 shall progress as follows:

3 (a) The transportation entity shall prepare a set of documents
4 setting forth the scope and estimated price of the project. The
5 documents may include, but need not be limited to, the size, type,
6 and desired design character of the project, performance
7 specifications covering the quality of materials, equipment,
8 workmanship, preliminary plans, and any other information deemed
9 necessary to describe adequately the transportation entity's needs.
10 The performance specifications and any plans shall be prepared
11 by a design professional who is duly licensed and registered in
12 California.

13 (b) Based on the documents prepared under subdivision (a), the
14 transportation entity shall prepare a request for proposals that
15 invites interested parties to submit competitive sealed proposals
16 in the manner prescribed by the transportation entity. The request
17 for proposals shall include, but need not be limited to, the following
18 elements:

19 (1) Identification of the basic scope and needs of the project or
20 contract, the estimated cost of the project, the methodology that
21 will be used by the transportation entity to evaluate proposals,
22 whether the contract will be awarded on the basis of the lowest
23 responsible bid or on best value, and any other information deemed
24 necessary by the transportation entity to inform interested parties
25 of the contracting opportunity.

26 (2) Significant factors that the transportation entity reasonably
27 expects to consider in evaluating proposals, including, but not
28 limited to, cost or price and all nonprice-related factors.

29 (3) The relative importance or the weight assigned to each of
30 the factors identified in the request for proposals.

31 (4) For transportation entities authorized to utilize best value
32 as a selection method, the transportation entity reserves the right
33 to hold discussions and negotiations with responsive bidders and
34 shall so specify in the request for proposals and shall publish
35 separately or incorporate into the request for proposals applicable
36 rules and procedures to be observed by the transportation entity
37 to ensure that any discussions or negotiations are conducted in
38 good faith.

39 (c) Based on the documents prepared under subdivision (a), the
40 transportation entity shall prepare and issue a request for

1 qualifications in order to prequalify the design-build entities whose
2 proposals shall be evaluated for final selection. The request for
3 qualifications shall include, but need not be limited to, the
4 following elements:

5 (1) Identification of the basic scope and needs of the project or
6 contract, the expected cost range, the methodology that will be
7 used by the transportation entity to evaluate proposals, the
8 procedure for final selection of the design-build entity, and any
9 other information deemed necessary by the transportation entity
10 to inform interested parties of the contracting opportunity.

11 (2) (A) Significant factors that the transportation entity
12 reasonably expects to consider in evaluating qualifications,
13 including technical design and construction expertise, skilled labor
14 force availability, and all other nonprice-related factors.

15 (B) For the purposes of subparagraph (A), “skilled labor force
16 availability” shall be determined by the existence of an agreement
17 with a registered apprenticeship program approved by the
18 California Apprenticeship Council that has graduated at least one
19 apprentice in each of the preceding five years. This graduation
20 requirement shall not apply to programs providing apprenticeship
21 training for any craft that was first deemed by the Department of
22 Labor and the Department of Industrial Relations to be an—
23 apprenticeable craft within the five years prior to the effective date
24 of this article.

25 (3) A standard questionnaire prepared by the transportation
26 entity. In preparing the questionnaire, the transportation entity may
27 consult with the construction industry, including, but not limited
28 to, representatives of the building trades and surety industry. This
29 questionnaire shall require information including, but not limited
30 to, all of the following:

31 (A) If the design-build entity is a partnership, limited
32 partnership, or other association, a listing of all of the partners,
33 general partners, or association members known at the time of bid
34 submission who will participate in the design-build contract.

35 (B) Evidence that the members of the design-build entity have
36 completed, or demonstrated the experience, competency, capability,
37 and capacity to complete projects of similar size, scope, or
38 complexity, and that proposed key personnel have sufficient
39 experience and training to competently manage and complete the
40 design and construction of the project, and a financial statement

1 that assures the transportation entity that the design-build entity
2 has the capacity to complete the project.

3 (C) The licenses, registration, and credentials required to design
4 and construct the project, including, but not limited to, information
5 on the revocation or suspension of any license, credential, or
6 registration.

7 (D) Evidence that establishes the design-build entity has the
8 capacity to obtain all required payment and performance bonding,
9 liability insurance, and errors and omissions insurance.

10 (E) Information concerning workers' compensation experience
11 history and a worker safety program.

12 (F) A full disclosure regarding all of the following that are
13 applicable:

14 (i) Any serious or willful violation of Part 1 (commencing with
15 Section 6300) of Division 5 of the Labor Code or the federal
16 Occupational Safety and Health Act of 1970 (Public Law 91-596),
17 settled against any member of the design-build entity.

18 (ii) Any debarment, disqualification, or removal from a federal,
19 state, or local government public works project.

20 (iii) Any instance where the design-build entity, or its owners,
21 officers, or managing employees submitted a bid on a public works
22 project and were found to be nonresponsive or were found by an
23 awarding body not to be a responsible bidder.

24 (iv) Any instance where the design-build entity, or its owners,
25 officers, or managing employees defaulted on a construction
26 contract.

27 (v) Any violations of the Contractors' State License Law, as
28 described in Chapter 9 (commencing with Section 7000) of
29 Division 3 of the Business and Professions Code, excluding alleged
30 violations of federal or state law regarding the payment of wages,
31 benefits, apprenticeship requirements, or personal income tax
32 withholding, or Federal Insurance Contribution Act (FICA)
33 withholding requirements settled against any member of the
34 design-build entity.

35 (vi) Any bankruptcy or receivership of any member of the
36 design-build entity, including, but not limited to, information
37 concerning any work completed by a surety.

38 (vii) Any settled adverse claims, disputes, or lawsuits between
39 the owner of a public works project and any member of the
40 design-build entity during the five years preceding submission of

1 a bid under this article, in which the claim, settlement, or judgment
2 exceeds fifty thousand dollars (\$50,000). Information shall also
3 be provided concerning any work completed by a surety during
4 this five-year period.

5 (G) In the case of a partnership or any association that is not a
6 legal entity, a copy of the agreement creating the partnership or
7 association that specifies that all partners or association members
8 agree to be fully liable for the performance under the design-build
9 contract.

10 (H) An acceptable safety record. A bidder's safety record shall
11 be deemed acceptable if its experience modification rate for the
12 most recent three-year period is an average of 1.00 or less, and its
13 average total recordable injury/illness rate and average lost work
14 rate for the most recent three-year period does not exceed the
15 applicable statistical standards for its business category or if the
16 bidder is a party to an alternative dispute resolution system as
17 provided for in Section 3201.5 of the Labor Code.

18 (4) The information required under this subdivision shall be
19 verified under oath by the design-build entity and its members in
20 the manner in which civil pleadings in civil actions are verified.
21 Information required under this subdivision that is not a public
22 record under the California Public Records Act, as described in
23 Chapter 3.5 (commencing with Section 6250) of Division 7 of
24 Title 1 of the Government Code, shall not be open to public
25 inspection.

26 (d) For those projects utilizing low bid as the final selection
27 method, the competitive bidding process shall result in lump-sum
28 bids by the prequalified design-build entities. Awards shall be
29 made to the lowest responsible bidder.

30 (e) For those projects utilizing best value as a selection method,
31 the design-build competition shall progress as follows:

32 (1) Competitive proposals shall be evaluated by using only the
33 criteria and selection procedures specifically identified in the
34 request for proposals. However, the following minimum factors
35 shall be weighted as deemed appropriate by the contracting
36 transportation entity:

37 (A) Price.

38 (B) Technical design and construction expertise.

39 (C) Life cycle costs over 15 years or more.

1 (2) Pursuant to subdivision (c), the transportation entity may
2 hold discussions or negotiations with responsive bidders using the
3 process articulated in the transportation entity's request for
4 proposals.

5 (3) When the evaluation is complete, the top three responsive
6 bidders shall be ranked sequentially from the most advantageous
7 to the least advantageous.

8 (4) The award of the contract shall be made to the responsible
9 bidder whose proposal is determined to be the most advantageous.

10 (5) Notwithstanding any other provision of this code, upon
11 issuance of a contract award, the transportation entity shall publicly
12 announce its award, identifying the contractor to whom the award
13 is made, along with a written decision supporting its contract award
14 and stating the basis of the award. The notice of award shall also
15 include the transportation entity's second- and third-ranked
16 design-build entities.

17 (6) The written decision supporting the transportation entity's
18 contract award, described in paragraph (5), and the contract file
19 shall provide sufficient information to satisfy an external audit.

20 6806. (a) The design-build entity shall provide payment and
21 performance bonds for the project in the form and in the amount
22 required by the transportation entity, and issued by a
23 California-admitted surety. In no case shall the amount of the
24 payment bond be less than the amount of the performance bond.

25 (b) The design-build contract shall require errors and omissions
26 insurance coverage for the design elements of the project.

27 (c) The commission shall develop a standard form of payment
28 and performance bond. In developing the bond form, the
29 commission shall consult with entities authorized to use the
30 design-build procurement method under this chapter and with
31 representatives of the surety industry to achieve a bond form that
32 is consistent with surety industry standards and practices, while
33 protecting the public interest.

34 6807. (a) The transportation entity, in each design-build request
35 for proposals, may identify specific types of subcontractors that
36 must be included in the design-builder's statement of qualifications
37 and proposal. All construction subcontractors that are identified
38 in the proposal shall be afforded all the protections of Chapter 4
39 (commencing with Section 4100) of Part 1 of Division 2.

(b) In awarding subcontracts not listed in the request for proposals, the design-builder shall do all of the following:

(1) Provide public notice of availability of work to be subcontracted in accordance with the publication requirements applicable to the competitive bidding process of the transportation entity.

(2) Provide a fixed date and time on which the subcontracted work will be awarded.

(c) Subcontractors awarded subcontracts under this chapter shall be afforded all the protections of Chapter 4 (commencing with Section 4100) of Part 1 of Division 2.

6808. Quality assurance inspections for the construction of any project on or affecting the state highway system utilizing the design-build method of procurement authorized under this chapter shall be performed by department personnel.

6809. Nothing in this chapter affects, expands, alters, or limits any rights or remedies otherwise available at law.

6810. (a) The retention proceeds withheld by a transportation entity from a design-build entity shall not exceed 5 percent.

(b) The transportation entity shall not withhold retention from payments to a design-build entity for actual costs incurred and billed for design services, construction management services, or where applicable, for completed operations and maintenance services.

(c) In a contract between a design-build entity and a subcontractor, and in a contract between a subcontractor and any subcontractor thereunder, the percentage of the retention proceeds withheld shall not exceed the percentage specified in the contract between the transportation entity and the design-build entity. If the design-build entity provides written notice to any subcontractor who is not a member of the design-build entity, prior to or at the time that the bid is requested, that a bond may be required and the subcontractor subsequently is unable or refuses to furnish a bond to the design-build entity, then the design-build entity may withhold retention proceeds in excess of the percentage specified in the contract between the transportation entity and the design-build entity from any payment made by the design-build entity to the subcontractor.

(d) In accordance with applicable state law, the design-build entity may be permitted to substitute securities in lieu of the

1 withholding from progress payments specified in subdivision (b).
2 These substitutions shall be made in accordance with Section
3 22300.

4 6811. (a) Not later than June 30 of each year after the
5 design-build contract is awarded, the awarding transportation entity
6 shall submit a progress report to the commission. The progress
7 report shall include, but shall not be limited to, all of the following
8 information:

- 9 (1) A description of the project.
- 10 (2) The design-build entity that was awarded the project.
- 11 (3) The estimated and actual costs of the project.
- 12 (4) The estimated and actual schedule for project completion.
- 13 (5) A description of any written protests concerning any aspect
14 of the solicitation, bid, proposal, or award of the design-build
15 project, including, but not limited to, the resolution of the protests.
- 16 (6) An assessment of the prequalification process and criteria
17 utilized under this chapter.
- 18 (7) An assessment of the impact of limiting retention to 5 percent
19 on the project, as required under Section 6810.
- 20 (8) A description of the labor compliance program required
21 under Section 6804 and an assessment of the impact of this
22 requirement on a project.
- 23 (9) A description of the method used to evaluate the bid,
24 including the weighting of each factor and an assessment of the
25 impact of this requirement on a project.
- 26 (10) A description of any challenges or unexpected problems
27 that arose during the construction of the project and a description
28 of the solutions that were considered and ultimately implemented
29 to address those challenges and problems.
- 30 (11) Recommendations to improve the design-build process of
31 construction procurement authorized under this chapter.

32 (b) The commission shall submit an annual report to the
33 Legislature that includes the information provided pursuant to
34 subdivision (a).

35 6812. (a) The peer review committee established pursuant to
36 subdivision (d) of Section 6803 shall conduct an evaluation of all
37 transportation projects using the design-build method of
38 construction procurement authorized under this chapter.

39 (b) The evaluation shall examine the procurement method,
40 comparing those projects using low bid and best value, and shall

1 consider whether the projects were on time and on budget. The
2 evaluation shall also compare the design-build projects to similar
3 transportation projects that used the design-bid-build method of
4 construction procurement.

5 (c) (1) The commission shall submit a midterm report of its
6 findings to the Legislature no later than June 30, 2011.

7 (2) The commission shall submit a final report of its findings
8 to the Legislature no later than June 30, 2016.

9 6813. The provisions of this chapter are severable. If any
10 provision of this chapter or its application is held invalid, that
11 invalidity shall not affect other provisions or applications that can
12 be given effect without the invalid provision or application.

13 6814. This chapter shall remain in effect only until January 1,
14 2016, and as of that date is repealed, unless a later enacted statute,
15 that is enacted before January 1, 2016, deletes or extends that date.

16 SEC. 2. No reimbursement is required by this act pursuant to
17 Section 6 of Article XIII B of the California Constitution because
18 the only costs that may be incurred by a local agency or school
19 district will be incurred because this act creates a new crime or
20 infraction, eliminates a crime or infraction, or changes the penalty
21 for a crime or infraction, within the meaning of Section 17556 of
22 the Government Code, or changes the definition of a crime within
23 the meaning of Section 6 of Article XII B of the California
24 Constitution.

25 SEC. 3. The Legislature finds and declares that Section 1 of
26 this act, which adds Section 6805 to the Public Contract Code,
27 imposes a limitation on the public's right of access to the meetings
28 of public bodies or the writings of public officials and agencies
29 within the meaning of Section 3 of Article I of the California
30 Constitution. Pursuant to that constitutional provision, the
31 Legislature makes the following findings to demonstrate the interest
32 protected by this limitation and the need for protecting that interest:

33 In order to allow transportation entities to fully explore and
34 utilize the Design-Build Demonstration Program as a method to
35 reduce project costs in the design and construction of highways,
36 bridges, and tunnel projects within this state, it is imperative to
37 protect the interests of those persons submitting bids for a
38 design-build project to ensure that any personal and confidential
39 information that is required to be submitted by those persons by

1 this act continues to be protected as personal and confidential
2 information.

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